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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. —620

UNITED STATES OF AMERICA, PETITIONER

v.

PAUL J. HOOLEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit reversing a conviction of the respondent for contempt of court based on the respondent's conduct before a grand jury.

OPINION BELOW

The opinion of the Court of Appeals (R. 143–148) is not yet reported. It should be read in connection with the opinion in the companion case of *Carlson* v. *United States* (R. 150–161).

JURISDICTION

The judgment of the Court of Appeals was entered January 7, 1954 (R. 148). On February

5, 1954, Mr. Justice Frankfurter extended the time for filing a petition for certiorari to March 8, 1954 (R. 149). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a) F. R. Crim. P.

QUESTION PRESENTED

Whether answers of "I don't remember" given by the respondent to questions asked him by a grand jury were so obviously false that they can be treated as equivalent to refusals to answer, and therefore as misbehavior in the presence of the court within the meaning of 18 U. S. C. 401 (1).

STATUTE INVOLVED

18 U. S. C. 401 provides that:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

STATEMENT

The respondent, Paul J. Hooley, was one of a series of witnesses subpoenaed before a grand jury of the United States District Court for the

District of Massachusetts which, at the time, was investigating a widely-publicized robbery from the Brink's Company on January 17, 1950. On the basis of his answers to certain of its questions, the grand jury, on December 8, 1952, filed a presentment which charged that respondent "did wilfully, deliberately, and contumaciously, by evasion and irresponsive answers, obstruct the process of this Court, and did obstruct justice in failing and refusing to answer proper questions in the Grand Jury proceedings" (R. 4–5). A judgment of conviction, which was entered after a trial before the court, has been reversed by the Court of Appeals, and the presentment ordered dismissed (R. 148).

The facts, as developed at the trial, are as follows:

The examination of respondent, which took place on December 2 and 4, 1952 (R. 5), showed that he was a brother-in-law of one Joseph O'Keefe, who was suspected of having had a major part in the Brink's robbery. It also showed that, on April 27, 1950, agents of the Federal Bureau of Investigation of the Department of Justice had searched his home (R. 11), pursuant to a search warrant reciting that it was suspected that $60,000 of the Brink's money was in respondent's home (R. 135–136).

Respondent claimed the privilege of self-incrimination, as to a number of questions as to which no issue is here raised.

In addition, there were a number of questions which respondent answered by saying that he did not know or that he did not remember. Some of these he ultimately answered. As to others, he continued to maintain that he could not remember. And as to others still he gave different and shifting answers, which, in substance were not answers. The subjects which he evaded are as follows:

1. Whether he had seen Joseph "Specs" O'Keefe from the date of the Brink's robbery to the time O'Keefe was sent to jail in Pennsylvania (R. 8, 9). Although respondent at first "couldn't say for sure" as to this question, he later admitted driving his wife to a meeting with Joseph O'Keefe shortly after the F. B. I. search of his home so that his wife could question O'Keefe about the search; respondent admitted that he was present during that meeting (R. 21).

2. Whether there had been any money in his home on the night of the F. B. I. search of April 27, 1950 (R. 11–13).

3. What was said in his presence between Mary O'Keefe (the wife of Joseph O'Keefe) and Mary Hooley (his own wife and Joseph O'Keefe's sister) on the night following the F. B. I. search of his home, when he and his wife went to Joseph O'Keefe's home (R. 16, 17). Respondent had admitted that he was only a few feet away from them during this conversation (R. 16–17).

4. What was said in his presence at a restaurant meeting between Joseph O'Keefe and Mary Hooley on the night following the F. B. I. search, at which respondent admitted that he was present (R. 21, 22, 41.)

5. Who had given his wife the child's chair with the secret compartment which, it appeared, had been made in the Charlestown State Prison (R. 24).

6. Whether his wife had a separate income (R. 34–35).

7. Whether a man named Rozman came to see him in 1950 about procuring $3,500 to get Joseph O'Keefe out of jail (although he later said he "wouldn't deny that") (R. 42).

8. Whether $30,000 in a joint account in his National Shawmut Bank account was used to purchase savings bonds for his children (R. 53).

9. Whether the money in the National Shawmut Bank account belonged to him or his wife (R. 53).

10. What he did with some $20,000 received from the sale of his tavern (R. 54–58).

11. The "substance" of a conversation which he had with Donald O'Keefe two days previously, which was the first day of his appearance before the grand jury (R. 55–56).

12. What he had said in his previous day of testimony about the disposition of money received from the sale of his tavern (R. 64).

The answers in connection with items 8 through 12 on this list were developed on the second day of respondent's appearance, and are particularly illustrative of the techniques used by respondent to avoid direct answers. Thus, after testimony showing the deposit of about $19,500 at or about the time respondent sold a tavern, the following occurred:

> Q. So that brought your account up as of November 15, 1950, to $30,368.44. I show you a notation, January 17, 1951, at which date—the beginning of that date—there was a balance of $30,588.44 in your account—$30,000 was withdrawn, leaving a balance of $588.44. Was that the amount which was withdrawn and paid for those bonds that you told us about the other day? A. I don't remember.
>
> Q. Well, you did tell us the other day that you had purchased some bonds for the benefit of your children. Do you remember telling us that the other day? A. No, I don't.
>
> Q. Well, would that be the fact—that you did buy some bonds for your children? A. I don't know.
>
> Q. You don't? A. No.
>
> Q. Your wife has just been in here, and she has stated to this Jury that this $30,000 was used to purchase bonds that had never left the bank. She merely transferred over $30,000 from your checking account for the purchase of these U. S. Savings Bonds, which were taken out for the benefit

of your children; would that be correct? A. I don't know.

Q. Well, it was your money, wasn't it? A. I don't remember.

Q. You don't remember whether the money in this account was yours or not? A. No, I don't.

* * * * *

And do you remember taking the money which you got for the sale of your tavern and putting it in the bank? A. No, I don't remember that.

Q. You don't remember what you did with the money? A. No.

Q. You don't know whether you put it in the bank or put it in any safe deposit box or any safe-keeping place in your home? A. I don't remember what I done with it. [R. 52-54.]

* * * * *

Now, we have got your wife and Donald you talked with. A. Yes.

Q. What was your conversation with Donald about? A. I don't remember.

Q. That conversation took place between Tuesday, this week, and today: you were in here Tuesday, you know. A. Yes. I imagine it did take place between Tuesday and today.

Q. And I asked you what the conversation was. A. I can't remember what the conversation was.

Q. Can you tell us what the substance of the conversation was? A. No, I can't.

Q. You can't? A. No. [R. 55-56.]

* * * * *

Q. Mr. Hooley, do you recall this question the other day: What did you do with the money? And your answer: You spent it.

Do you recall that question and answer? A. No, I don't recall it.

Q. You have a very short memory, haven't you? A. I don't know.

Q. Well, do you recall the other day that you told us that you put the money in the bank? A. No, I don't.

Q. Do you recall this question: You don't know what happened to the $21,000 you got for the sale of the tavern? Answer: I put it in the bank. A. I don't remember that.

Q. Well, do you remember now that you did put it in the bank? A. I don't remember what I done with it.

Q. Well, will you say that you didn't put it in the bank? A. I don't remember what I done with the money.

Q. If you didn't put it in the bank, where did that money come from? A. I don't know.

Q. You don't know where it came from? A. What do you mean—from the tavern?

Q. I am asking you, if you don't recall that you put that money which you received from the tavern in the bank, how do you account for the amount of money that's under deposit in the West Roxbury—— A. I imagine it went to the bank.

Q. You imagine. You know very well, don't you? A. I am not sure.

Q. You aren't sure? A. No.

Q. Are you sure that it belongs to you at all? A. It must have been mine.

Q. You don't find many people running around depositing their money in your account, do you? A. I don't think so.

Q. When you went to Brockton, the Chinese Restaurant, did you go to more than one Chinese Restaurant? A. I think I went to another one.

Q. Well, did you say that the other day? A. I don't remember.

Q. You don't remember that, either. A. No, I don't remember. [R. 57–58]

* * * * *

Q. Well, the fact that you deposited $19,500 on November 2nd of 1950, does that help you to refresh your recollection as to whether you deposited that money from the sale of the tavern in the bank or not? A. No, it don't.

Q. That doesn't even help you? A. No.

Q. Well, you're in bad shape.

Q. Well, now, after reading these questions and answer which you have given us on Tuesday of this week—two days ago—can you tell us now what you did with the money that you received from the sale of the tavern? A. No, I don't know what I done with it.

Q. Don't know? A. Can't remember.

Q. Can't remember? A. No. [R. 64]

* * * * *

A JUROR. In those two restaurants that you went to, when you went out to Brockton, you mentioned the fact this morning that you went to two Chinese restaurants. Did you eat in both of them?

The WITNESS. I don't remember. I really don't remember.

A JUROR. You don't know who paid the check?

The WITNESS. No.

A JUROR. You didn't pay it?

The WITNESS. I don't believe so.

A JUROR. You don't remember?

The WITNESS. I don't remember. I may have paid it. [R. 65]

* * * * * *

The Government's case under the presentment consisted of a reading of the transcript, calling particular attention to the testimony of the second day (R. 52–65; R. 88, 90, 102). Respondent thereafter, in defense, made offers of proof that Joseph O'Keefe (R. 111–112) and Mary Hooley (R. 123) would testify in mitigation and extenuation of the crime charged against him, and that he, the respondent, would "explain his answers to each and every question contained in this transcript" (R. 119). However, the court on several occasions ruled that the witnesses could not testify to any matters that would bear on evasiveness, and that the proper course was for Hooley to go to the grand jury room and answer all of the questions, except those relating to the stolen

television set (see R. 109, 113). Hooley declined to do so (R. 114, 119, 128).

The court found Hooley guilty of contumacious conduct "by reason of giving evasive and irresponsive answers to proper questions" (R. 131), pointing out that the finding was "on the basis of the whole, overall picture in this presentment before me" (R. 130). The court sentenced him to nine months' imprisonment (R. 132).

The Court of Appeals reversed the conviction (R. 148). Its opinion conceded that (R. 144)—

> * * * there were a suspiciously large number of questions to which his answers were of the "I don't remember" variety; and reading the cold print of the transcript of his testimony one might warrantably infer that at least in some of these instances he must have known and remembered about the matters inquired about, so that his avoidance of a direct and responsive answer under the pretext advanced was a purposeful evasion.

Nonetheless, the court concluded that such conduct in a grand jury room was not misbehavior in the presence of the court which could be punished summarily as a criminal contempt under 18 U. S. C. 401 (1). As was explained in the court's opinion in the companion case of *Carlson* v. *United States* (R. 150–161), such conduct was perjury and could be punished only as perjury; and the fact that there were a number of perjurious

answers, rather than only a few, could not change perjury into contempt.

In addition, the court stated that if it were wrong in this view, there was still a fatal procedural error committed in that the trial court had refused to permit the respondent to testify in his own defense (R. 147-148). It was admitted that if this had been the only error, a remand for a new trial would have been the proper order; but since the conduct could not in the court's view have been a contempt in any event, the case was remanded with directions to dismiss the presentment (R. 148).

REASONS FOR GRANTING THE WRIT

1. The holding of the Court of Appeals that the answers of "I don't remember" by the respondent were not contumacious, because they were perjury and nothing more, is in conflict with *United States* v. *Appel*, 211 Fed. 495 (S. D. N. Y.), which, in relation to the problem now before the Court, was given explicit endorsement, in *Ex parte Hudgings*, 249 U. S. 378, and which, more recently, this Court took pains to distinguish in *In re Michael*, 326 U. S. 224.

This Court held in *Ex parte Hudgings* that the commission of perjury before a grand jury was not alone a sufficient basis to support a prosecution for contempt. This view was explicitly reaffirmed in *In re Michael, supra.*

The basis of this view, as those cases make clear, is that contempt subjects a defendant to summary punishment without benefit of jury trial; and that such a remedy should not be extended further than necessary to protect the processes and dignity of the court.

Both the *Hudgings* and *Michael* cases, however, recognize that the fact that a perjury is involved does not preclude a prosecution for contempt. As *Hudgings* states (249 U. S. at 383):

> * * * in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty. As illustrative of this, see *United States* v. *Appel*, 211 Fed. Rep. 495.

Appel thus deals with a situation where the further element of obstruction was thought, by this Court, to be sufficient to justify punishment of the witness a contempt. In that case, the witness testified that he could not remember what he had done with various substantial sums of money which he had withdrawn from his account shortly before his grand jury testimony. He answered either that he did not remember or that he had lost various amounts at gambling, not being sure just how much. Judge Learned Hand, then a district judge, stated the essence of the matter,

in sustaining a charge of contempt, as follows (211 Fed., at 495):

> The power of the court to treat as a criminal contempt a persistent perjury which blocks the inquiry is settled by authority in this circuit. * * * It is indeed impossible logically to distinguish between the case of a downright refusal to testify and that of evasion by obvious subterfuge and mere formal compliance.
>
> The rule, I think, ought to be this: If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like anyone else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week. If a court is to have any power at all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry. Nevertheless, this power must not be used to punish perjury, and the *only proper test is whether on its mere face, and without inquiry collaterally, the testimony is not a bona fide effort*

to answer the questions at all. [Italics supplied.]

We think it is clear that, by the *Appel* standard, the very face of respondent's testimony shows that it was not a *bona fide* effort to answer the questions, but was in substance a refusal to answer at all. We think it is equally clear that the court below did not apply this standard. Although it stated that it was a warrantable inference from the face of the record that some of the respondent's answers were purposeful evasions, see *supra,* p. 11, the court below did not consider whether the evasions were so patent as to be in effect refusals to answer at all. That court, indeed, seems to have assumed that, since there was a perjury, there could be no contempt. It discussed the *Hudgings* and *Michael* cases (in the companion *Carlson* opinion) but principally for the purpose of saying that a perjury with respect to the privilege against self-incrimination as well as a claimed failure to remember was not, by itself, a contempt.

The Court failed to consider the explicit recognition of the *Appel* decision in *Hudgings,* as well as the careful way in which this Court in *Michael* pointed out that the *Appel* situation was not before it because the falseness of the answers did not appear on the face of the record but had to be proved by testimony of witnesses (326 U. S. at pp. 228–229). It is this failure to treat with the contumaciousness of the answers on their face

that constitutes the conflict, not only with *Appel*, but with a number of other decisions which have applied the *Appel* test of whether on its face the alleged failure of memory amounts to a refusal to answer. See, e. g., *In re Meckley*, 137 F. 2d 310 (C. A. 3), certiorari denied, 320 U. S. 760 (see also opinion in District Court, 50 F. Supp. 274, 275–277 (M. D. Pa.)); *United States* v. *McGovern*, 60 F. 2d 880, 889–890 (C. A. 2); *O'Connell* v. *United States*, 40 F. 2d 201 (C. A. 2); *Schleier* v. *United States*, 72 F. 2d 414 (C. A. 2); *In re Schulman*, 177 Fed. 191 (C. A. 2); cf. *Blim* v. *United States*, 68 F. 2d 484 (C. A. 7). We submit that the decision below is in substantial conflict both with *Appel* and with this line of cases.

Had the *Appel* standard been applied, a different result below would have been required. The record here shows this particularly in the respondent's answers to the questions involving the disposition of the proceeds of the sale of his tavern. It is clear that respondent is not a wealthy person; indeed, it appears that at the time of his testimony he was living in low rent public housing development (R. 29). It is incredible that he would not have known what he did with the $21,000 he received at the time he sold his tavern. It is incredible that he would not have known whether it had been used to buy bonds for his children, or whether the money, which was put into his account at about the time

of the sale and which brought the balance up to about $30,000, was his or not. Even more significant in making clear the respondent's deliberate intention to avoid answers on this point was his testimony on his second appearance before the grand jury that he did not remember whether he had made particular statements to the jury two days earlier concerning his disposition of these sums which were inconsistent with his alleged failure to remember. A comparison between respondent's explanations the first day, which shifted from a claim that he believed he put the money in the bank (R. 29) to a claim that he had spent it for "different things" (R. 30), with his testimony the second day that he did not remember what he did with the money, nor even what he had said two days before, all coupled with the extreme unlikelihood that he would not have known where so large a sum had gone, makes it obvious that respondent was in substance simply refusing to answer. At times it appeared that the respondent was not even interested in whether his answers were believed. His intention seems to have been not so much to deceive his listeners as merely to avoid answering.

Nor was this colloquy isolated. Shifts and evasions pervaded his testimony. As we pointed out in the Statement, *supra*, pp. 7–8, respondent stated that he could not remember the "substance" of a conversation which he admittedly

had with Donald O'Keefe in the two day period between his appearances before the grand jury. He stated at one time that he could not remember whether he had seen Joseph "Specs" O'Keefe in the 10 month period between the time of the Brink's robbery in January 1950 and O'Keefe's incarceration in Pennsylvania, in November; but he later admitted being present at a conversation between his wife and Joseph O'Keefe the day after the F. B. I. had searched his home, a series of events which it seems unlikely he would have forgotten. He could not testify as to the substance of the conversation between his wife and Joseph O'Keefe on this occasion, except that he remembered that his wife asked her brother why their home had been searched. He gave shifting answers to questions about the donor of a child's chair in his apartment which had a secret compartment and which, it appeared, had been made in the Charlestown State Prison.

We do not contend that all of these assertions are as plainly evasions as respondent's shifting assertions concerning the disposition of the tavern sale proceeds. They emphasize however what is plain on this record: that, as to questions which he did not care to answer and as to which he could not or did not choose to claim the privilege against self-incrimination, respondent simply resorted to a failure of memory, however improbable such a failure might be.

This was a contempt as much as it would have been a contempt for the respondent to refuse to answer at all.

2. The question of the continuing validity of the *Appel* rule, a rule which this Court has approved, is important. It will determine whether contempt proceedings may be utilized to obtain testimony from unwilling witnesses who refuse to answer grand jury questions by going through the pretense of answering. The alternative of a perjury prosecution has only the deterrent effect of punishment after the deed and lacks the effectiveness of contempt proceedings to induce the witness to answer.[1]

3. The Government does not challenge the holding of the court below insofar as it relates to questions which respondent answered by claiming the privilege against self-incrimination. This does not, however, affect the validity or importance of the contention that the Court of Appeals erred in its holding on the "I don't remember" answers, since the latter are alone sufficient to sustain a finding of contempt. Nor does the Government challenge the view of the Court of Ap-

[1] It may even be suggested that such palpable evasions as are here involved are not perjuries. A witness, who tells a story that he plainly does not believe and which he knows cannot reasonably be believed by those who hear him, may not be making a misstatement of fact within the meaning of the perjury statute. Even for a perjury prosecution, his statement is, in substance, a statement that he will not answer. Such a statement, of course, is not a misrepresentation.

peals that the District Court erred in refusing to permit the respondent to testify as to his good faith at the trial in stating that he did not remember or that he feared incriminating himself. Again, however, this does not affect the question which this Court is asked to review. The Court of Appeals explicitly stated that if the procedural error were the only error, the case could be sent back for a new trial; but that in view of its holding that the answers given could not constitute contempts, the contempt proceeding would have to be dismissed.

The Government therefore requests the grant of a petition for a writ of certiorari only to review of the question whether the Court of Appeals erred in holding that the respondent's "I don't remember" answers, and answers similar thereto, were not a contempt.

CONCLUSION

For the reasons stated, and as limited, it is respectfully submitted that this petition for a writ of certiorari be granted.

SIMON E. SOBELOFF,
Solicitor General.

MARCH, 1954.

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